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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

VS.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA,

Appellee.

MOTION TO DISMISS OR AFFIRM AND APPELLEE'S COUNTER STATEMENT AS TO JURISDICTION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Motion to Dismiss or Affirm

Comes now the appellee, State Milk Commission of the Commonwealth of Virginia, by its undersigned counsel, and moves this Honorable Court that it dismiss the appeal heretofore granted in this case, or, in the alternative, affirm the judgment of the courts below.

For cause of this motion the appellee says that the question involved is not substantial within the meaning of this

Honorable Court's Rule 12 and the cases of *MacArthur* v. *United States*, 315 U. S. 787 and *Zucht* v. *King*, 260 U. S. 174, as appears from the appellee's counterstatement as to jurisdiction hereinafter set forth.

Appellee's Counterstatement as to Jurisdiction

I. The Facts

The record in the court below which will be transmitted to this Honorable Court, contains the transcript of the hearings before the State Milk Commission. The facts shown by that record, insofar as material, may be summarized as follows:

A typical dairy, Chestnut Farms Dairy, sold at wholesale and retail in this market 13.77% of its total sales and sold 33% of the total sales in this area. Chestnut Farms Dairy purchases milk from Virginia, Maryland, West Virginia and some from Pennsylvania. It purchased 46.09% of its total purchases in the State of Virginia. Chestnut Farms Dairy purchased from Virginia 53.45% of all the milk that was purchased in Virginia by all distributors in the Arlington-Alexandria and Manassas market area and the District of Columbia. 28.09% of all its Virginia purchases was sold by Chestnut Farms Dairy in this market area.

The Virginia milk purchased by Chestnut Farms was processed, along with all other milk purchased, at its plant in the District of Columbia. The milk and other dairy products thus processed were loaded on trucks at its plant in the District of Columbia and sales were made from these trucks in this market area both at wholesale and at retail.

Chestnut Farms operates 15 or 20 truck routes in the Arlington market area. The drivers in charge of the trucks are in reality salesmen and solicitors. These men solicit from door to door and from store to store selling their product. They are paid on a commission basis with a guaranteed

minimum salary. When the driver starts out with his truck in the morning he does not know the volume that he will sell that day. He sells to the stores whatever the store manager or store owner elects to buy that day. He usually makes his collections daily from the stores or restaurants and collects from the various doorstep deliveries weekly or monthly. It is the practice of the Chestnut Farms to keep additional trucks ready at the plant to supply the emergency sales made by the various truck driver-solicitors in excess of their truck loads. The driver 'phones in and meets his new supply at an appointed place and the driver-solicitor proceeds from there for his additional sale. True it is that the doorstep home owner consumer is more regular in his purchases to the extent that there is usually a standing order for one or two quarts, etc., but even these are increased or entirely cut off from time to time by notes or memoranda at the doorstep. The driver-solicitor leaves a bill at the doorstep and is paid at the doorstep and keeps his own book of account and records in his truck. It is true that there are some substantial number of individual consumers who send monthly checks direct to Chestnut Farms Dairy in Washington in payment of their milk bills. It is true also that Chestnut Farms Dairy does not have a processing plant or a receiving plant in the State of Virginia or in this market area. For all practical purposes the truck is the store from which the sales are made and the driver is the solicitor, salesman and store clerk through whom the merchandise is sold and delivered to the consumer or customer and payment made therefor. Approximately 50% of the total milk sold by Chestnut Farms Dairy in this marketing area in Virginia is sold at wholesale and 50% at the doorstep.

In the year 1950 Chestnut Farms Dairy paid an income tax to the State of Virginia in the sum of $16,333.00 on business done in Virginia. In addition it paid for business and

store licenses on the trucks the same being in the nature of peddlers licenses the sum of $6,762.00. Items in similar amounts have been paid for many years. The District of Columbia for many years through its taxing authority has recognized this volume of business as done in Virginia and has not taxed that volume as business done in the District of Columbia. The testimony indicates that Thompson's Dairy, the next largest dairy in this area, operates in the same fashion buying 55% of its total milk in Virginia and selling 23% of its total sales in this market area.

The Lucerne Milk Company which is a trade name for the milk division of Safeway Stores receives its milk from shippers in Maryland and Virginia through the Maryland and Virginia Milk Producers' Association at its plant in the District of Columbia. The milk is processed there and packaged. Safeway transports milk from its District plant to its Virginia stores. It sold in this market area 17.09% of its total milk sales in the metropolitan Washington area. It sold 10½% of all Virginia sales and purchased from Virginia producers 15.03% of its total purchases of milk. Its Virginia sales amounted to 11.6% of its Virginia purchases. Safeway has no milk routes in Virginia but distributes all of its dairy products direct to retail customers coming to its stores. Safeway operates its trucks that deliver the milk from the Washington processing plant to its various stores in Virginia on the same commission basis for the truck driver as route salesmen and wholesale drivers of other distributors. All of these truck driver salesmen are in the same Union and are employed under the same Union contract as is applicable to the entire milk distributing industry in this area.

Chestnut Farms Chevy Chase Dairy, Thompson's Dairy, Lucerne Milk Company and the Milk Division of Safeway Stores are the principal distributors who offered testimony in this proceeding. They raised no question of the right

of respondent to fix minimum prices nor did they or do they contend that the fixing of a minimum sales price is a burden on them or on interstate commerce.

II. The Law

It is the contention of appellee that the State of Virginia can and has authorized the Milk Commission to regulate the sale price of milk sold under these circumstances and that such a regulation does not place a burden upon interstate commerce.

Further it is the contention of appellee that the sales in question are Virginia transactions and not transactions in interstate commerce; that even if they were in interstate commerce the fixing of minimum prices is not a burden on interstate commerce; and even if it were the burden is not undue and is still within police power of the state to protect its milk industry in the state by such regulations.

These contentions seem so well established by decisions of this Honorable Court, to prohibit the raising of a substantial question on this appeal.

A. The Sale of Milk by Chestnut Farms Dairy in the Arlington Market Area Is Local and Is Subject to the Control of the Act.

From the aforegoing facts it is obvious that all the sales of Chestnut Farms Dairy and similar dairies are local in Virginia, whether made to wholesale or retail customers. It is interesting to observe that while counsel for the Arlington County Board of Commissioners could have contended and did originally contend that both types of sales were in Interstate Commerce, he has in the court below not done so with respect to wholesale sales. He now, therefore, confines his thesis to the contention that the transportation and sale from trucks of distributors in the District of Columbia to door steps of *consumers* in Arlington is in Interstate Com-

merce and therefore the Virginia Milk Commission has no authority to fix a minimum resale price therefor. Just why sale by distributors to wholesalers should not be in Interstate Commerce while sales to consumers under identical same circumstances should be in Interstate Commerce is not clear.

On this point it would seem that the case of *Wagner* v. *Covington*, 251 U. S. 101, should be more than controlling. Plaintiffs, manufacturers of soft drinks in Cincinnati, Ohio, sold in Covington, Kentucky, from their vehicle to various purchasers such soft drinks as the purchasers might need from time to time. The trucks carried sufficient drinks to meet the probable demands of customers but with the exception of occasional small amounts carried for delivery in response to particular orders previously received at plaintiffs' plant of business in Cincinnati, all of the sales in Covington were made from the vehicle by the driver. Sometimes the driver sold his entire supply or only part of it. The sales were made in the bottles as filled in Ohio. The driver collected cash from time to time from his customers. The statement of facts in this case are almost identical with the testimony in the case at bar. In upholding the right of the City of Covington to tax the plaintiff and to recover license fees from them under certain city ordinances the Court said:

> "If in respect to this portion of their business, plaintiffs may be subjected to the regulatory power of the state acting through the municipality, we are not concerned with the question whether the general language of the ordinances, if applied with respect to some other method of dealing with goods brought from state to state might be repugnant to the Federal Constitution.
>
> "From the facts recited it is evident that, in essence, that part of plaintiffs' business which is subjected to regulation is the business of itinerant vendor or peddler,—a travelling from place to place within the state,

selling goods that are carried about with the seller for the purpose. * * *

"Of course, the transportation of plaintiffs' goods across the state line is of itself Interstate Commerce; but it is not this that is taxed by the City of Covington, nor is such Commerce a part of the business that is taxed, or anything more than a preparation for it. *So far as the itinerant vending is concerned, the goods might just as well been manufactured within the State of Kentucky;* to the extent that plaintiffs dispose of their goods in that kind of sales, they made them the subject of local commerce, and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not."

Apropos of the emphasis supplied above, it might be observed that the milk was bought from Virginia producers in excess of the amounts so sold in Virginia.

The case of *Caskey Baking Company, Inc.* v. *Commonwealth of Virginia,* 313 U. S. 117, decides the same question with respect to bread brought from West Virginia bakeries and sold in the State of Virginia.

It must be remembered that in the record before the Commission the Chestnut Farms Dairy takes out a peddlers or store license on every one of its trucks that operates these truck routes in Virginia and paid in such license fees on those trucks a sum in excess of $6,000.00 in the year 1950. How then could Chestnut Farms Dairy contend in one breath that it was engaged in retail selling from trucks licensed under store licenses and in the next moment contend that it was engaged in Interstate Commerce as to that milk so sold. Chestnut Farms Dairy pays to Arlington County and to Alexandria County each $150.00 peddlers (or store) license fee per year per truck. *Does it not seem to be the height of inconsistency for Arlington County to contend that it is collecting those license fees illegally by arguing*

that these trucks are engaged in selling in Interstate Commerce.

B. Does the Processing and Bottling of Virginia Milk Outside of Virginia for Sale and Delivery in Virginia Create Interstate Commerce.

Chestnut Farms, for example, purchased from Virginia Producers 46% of its total milk supply. It sold in Virginia 28.09% of its Virginia purchases. It must be obvious that Chestnut Farms merely processes in bottles in the District of Columbia about half of its Virginia purchases and returns the milk to Virginia for sale. Suppose that Alexandria Dairy, a dairy under the jurisdiction of appellee, which purchases all its milk from Virginia Producers and sells all of its milk in Virginia, merely transported from a receiving station in Virginia a substantial portion of its milk supply to a processing and bottling plant in the District of Columbia and returned it in its own trucks to Virginia, could it then be contended that Alexandria Dairy is engaged in Interstate Commerce and would not be bound by the minimum price provision. Could it be argued for a moment, that by so doing, Alexandria Dairy could relieve itself of its obligations to comply with the Virginia milk statute and the decisions of this Commission? To ask the question is to answer it. Obviously it could not. It is difficult to see how Chestnut Farms or any other distributor can avoid the jurisdiction of the Milk Commission in view of the foregoing statistics.

C. This Appeal Is Disposed of by the Cases of Highland Farms Dairy v. Agnew; Nebbia v. New York, and Hood v. Du Mond, in this Court.

Counsel for the appellants seems to ignore almost entirely the real meaning of the decision of the United States

Supreme Court in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, in which decision the Court upheld *in toto* the Milk Commission Act of Virginia, the same being Chapter 17 Article 2 Code of Virginia. This Act is almost identical, certainly so far as the fixing of minimum and maximum resale prices is concerned, with the Acts of New York, Pennsylvania and various other forward looking States, all of which have been sustained by the Supreme Court of the United States and will be referred to later.

The Act creating the Milk Commission for Virginia defines "distributor" with an additional definition than that referred to in the *Agnew* case as follows:

> "Distributor means any of the following persons engaged in the business of distributing, marketing *or in any manner handling fluid milk*, in whole or in part in fluid form for consumption in this State:
>
> I. Persons, irrespective of whether any such person is a producer:
>
> (a) who pasteurize or bottle milk or process milk into fluid milk.
>
> (b) who sell or market fluid milk at wholesale or retail,
>
> (1) to hotels, restaurants, stores or other establishments for consumption on the premises,
>
> (2) to stores or other establishments for resale,
>
> (3) to *consumers*."

The Act then provides that distributors shall be licensed. These D. C. distributors are so licensed. The Act then provides that maximum and minimum prices are to be fixed by the Commission with which all distributors must comply.

In considering this statute this Honorable Court in affirming the District Court for the United States for the Eastern District of Virginia in 300 U. S. 614 said:

> "The Statute does not lay a burden on interstate commerce."

The contention made by appellants as to the meaning of the word "distributor" in that case is then answered. The definition of the word distributor discussed in the opinion is the second paragraph of the definition and not the one cited above. In the *Agnew* case it was agreed that Highland in the District of Columbia bought milk and sold in interstate commerce. He sold it to a man by the name of High who resold it in Virginia and thus became a distributor. This Court very appropriately said:

> "Highland in Washington may sell to High in Virginia and High may buy from Highland at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on resale [the Court citing among other cases, *Baldwin* vs. *G. A. F. Seelig*, 294 U. S. 511, which will be referred to later]."

Counsel in his memorandum before the lower Court comments on this decision as follows:

> "There is no essential difference between Highland and High and between the Thompson Dairy (likewise Chestnut Farms) and the writer of this brief who receives their milk at his doorstep."

The writer is completely in error. The writer of the brief is a consumer. High in the *Agnew* case was a distributor. Highland was admittedly in interstate commerce. The purchase and sale was by High, a distributor, from Highland also a distributor in the District of Columbia. The more apt comparison the writer could have made would have been to have compared the *Agnew* case to Safeway, which purchases and processes its milk in the District of Columbia as the Lucerne Milk Company and delivers and sells its milk through its stores in Virginia. Counsel for appellants seems

to concede that Safeway's operation comes within the Virginia Statute.

The *Agnew* opinion then goes on to say at 300 U. S. 614-15:

> "No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area."

Why is it that counsel for appellants concedes that sales made by Chestnut Farms and Thompson's trucks to stores and restaurants (which trucks carry a peddler's or store licenses) are within the jurisdiction of the Commission, but sales made from the same trucks to consumers are not within its jurisdiction? The evidence shows that the sales are made under identically the same conditions. Certainly milk delivered to a restaurant in fluid form is delivered "for consumption" in the State. Is there any difference between the consumer on the doorstep and the consumer in the restaurant? Of course, a restaurant too is a consumer as well.

Counsel for appellants in his statement as to jurisdiction seems to have overlooked entirely the decision of the highest Court of the State of Virginia upholding the price fixing provision of this Act. In *Reynolds* v. *Milk Commission*, 163 Virginia 957, the Supreme Court of Appeals passed upon the validity of this statute in a case in which it was sought to enjoin the distributors from selling milk at a price lower than the prescribed minimum. Commenting upon that decision this Court said in the *Agnew* case, 300 U. S. 613 "*a judgment by the highest Court of a State as to the meaning and effect of its own constitution is decisive and controlling everywhere.*"

The decision of this Honorable Court in the case of *Nebbia* vs. *New York*, 291 U. S. 502-559 sustaining the New York Milk Law on all constitutional points in 1933 would seem to be a total and complete answer to the contention

of counsel in his memorandum. The New York law was promulgated by the Legislature of New York after a long investigation into the industry from every standpoint. The entire question of its constitutionality so far as the police power of the State to control the industry was concerned, the production and importation of milk into the State of New York, the fixing of minimum prices was squarely presented.

It is impossible in this memorandum to quote the various paragraphs in the *Nebbia* case that completely answer counsel's contention. The New York Milk Act was the forerunner of all similar Milk Control Acts thereafter passed in many of the Eastern States. Every constitutional objection including the interstate commerce question was raised in that case. That Act provided for minimum resale prices of which complaint is made here. In one sentence, 291 U. S. at 537, this Court completely answered counsel's contention:

> "But there can be no doubt that upon appropriate action and by appropriate measures the State may regulate a business in any of its aspects including the prices to be charged for the products or commodities it sells."

This Court also said, 291 U. S. at 538:

> "Where the public interest was deemed to require the fixing of minimum prices that expedient has been sustained. If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumers' interest, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or protend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because

> the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, *is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt*, and hence an unnecessary and unwarranted interference with individual liberty." (Emphasis added.)

The *Nebbia* case holds that it is within the police power of a state to protect its milk industry from price-cutting and evil trade practices in order that producers, distributors and consumers might have an adequate supply of wholesome milk at a price that will insure continued and adequate production. The action of the Milk Board in fixing a minimum retail price for all milk is in no way discriminatory or irrelevant to the policy of such legislation. If so-called "interstate commerce milk" could be brought in from other states and sold on a cut-price basis in Virginia, the state would soon become a dumping ground for surplus milk at various seasons, the whole price structure would be destroyed and the legislature of Virginia would be wholly unable to protect the very industry that the *Nebbia* case says it has a right to protect.

The opinion of this Court in *Hood* v. *Du Mond*, 336 U. S. 529, referring to the *Nebbia* case says:

> "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a Constitutional stand-

point hardly controversial. Also the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. These have involved, detailed, intricate and comprehensive regulations, including price fixing."

D. The Fixing of Minimum Sale Prices Is Not a Burden on Interstate Commerce Because Not Undue or Discriminatory.

In the memorandum of counsel there are cited many cases that are entirely appropriate in their setting but many of them state principles with respect to so-called regulations of interstate commerce that have long since been outmoded. Many of the cases on the subject have used the words "restraints", "obstructions", "in commerce", "on commerce", "burdens", "direct burdens", "undue burdens", "unreasonable burdens", "unfair burdens", "incidental burdens", but such words have almost always been used as the opinions show to aid the Court in trying to balance the right of a State to regulate a business such as the milk industry under its police power and at the same time not to discriminate against interstate commerce in that same industry. *There is no question but that a State may appropriately place some burden upon interstate commerce.* There is no case in the books which is a better illustration of this fact than this Honorable Court's decision in *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 349,

In that case the Pennsylvania Milk Control Law required a State license of all persons who handled or purchased milk within the Commonwealth for sale *within or without* the Commonwealth. It required all dealers, interstate and intrastate, to keep records and to give bonds for payment to producers. Dealers who sold milk within or without the State were required to pay state-fixed prices. The purpose was the protection of milk farms in Pennsylvania from

what were deemed to be the evils of cutthroat competition. The law was applied against Eisenberg who handled and operated a milk receiving plant in Pennsylvania where the milk was weighed, tested and cooled preparatory to shipment to New York. Unquestionably Eisenberg was engaged in interstate commerce. *Without doubt the requirements imposed upon Eisenberg were not only burdens but very great and substantial burdens. What greater burden could there be upon him than that he should pay for his purchase a price fixed by the State.* Certainly there was no free right of purchase and sale and no bargaining.

In passing one must wonder how counsel can distinguish between the right of the State to fix a universal purchase price in local and interstate commerce and the fixing of a universal minimum sale price for the same kind of commerce.

In upholding the legality of the Pennsylvania Statute this Court in 306 U. S. at 350, said:

> "The Respondent contends that the Act, if construed to require it to obtain a license, to file a bond for the protection of producers, and to pay the farmers the price prescribed by the Board, unconstitutionally regulates and burdens interstate commerce. The State Supreme Court has held that the Statute is a valid police regulation. The Petitioner concedes that the purchase, shipment into another State, and sale there of the milk in which the Respondent deals, is interstate commerce. The question for decision is whether, in the absence of Federal Regulation the enforcement of the Statute is prohibited by Article I, Paragraph 8 of the Constitution. *We hold that it is not.* * * *
>
> "Every State Police Statute necessarily will affect interstate commerce in some degree, but such a Statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

A complete reading of the entire opinion sustains the argument that states can impose burdens in interstate commerce, particularly where such burdens are not discriminatory, and where, as the Court said in the *Eisenberg* case *"the activity affected by the regulation is essentially local"*. That case would seem to be more than controlling here.

We are not alone in this comment with respect to the *Eisenberg* case. Mr. Justice Black of the Supreme Court in his dissent in the case of *Hood* v. *DuMond*, 336 U. S. 558 commented on the *Eisenberg* case as follows:

> "The Eisenberg case thus sustained the power of a State to require licenses from interstate dealers and to impose conditions on their interstate commerce transactions in order to *effectuate legitimate State policy*. And the conditions Pennsylvania imposed were burdensome, as this Court recognized they erected obstacles which were bound to limit the number of interstate dealers. * * *
>
> "Pennsylvania imposed these burdens on interstate commerce to promote health and to protect its farmers from the consequences of destructive competition among dealers."

Counsel for appellants rely very heavily upon the ideas expressed in the case of *Baldwin* v. *Seelig*, 294 U. S. 511-528. This case when studied and analyzed is so different from the case at bar that one cannot help but wonder why it was referred to at all. It establishes principles which decide the contention of appellants against them. The crucial facts of that case are as follows:

The New York law fixes a minimum price for milk bought by New York dealers from New York farmers. Vermont's legislative policy left milk dealers free to fix milk prices by bargaining. Seelig, a New York dealer, sold milk in New York which had been bought from Vermont farmers at prices below that fixed for New York farmers

by New York law. The New York Milk Control Act with the aid of regulations made thereunder set up a system of minimum prices to be paid by dealers to producers. The Act had a provision whereby the protective prices to be paid to New York farmer were extended to that part of the supply which comes from other States. It provided that there should be no sale within New York of milk bought outside the State unless the price paid to the purchasers was one that would be lawful upon a like transaction within the State. This Court in holding that the Milk Control Act was invalid to this extent said:

> "New York has no power to project its legislation into Vermont by regulating the price to be paid in that State for milk acquired there. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. Accepting these postulates New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it but sell it he may not.
>
> "Such a power, if exerted, will set a barrier to traffic between one State and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported."

The real meaning of *Baldwin* v. *Seelig* is again found in Mr. Justice Black's dissent in *Hood* v. *DuMond*, 336 U. S. at 556:

> "Even though the Court regarded the Baldwin vs. Seelig law as discriminatory, other considerations were added to weight the scales on the side of invalidation. Its impact on Vermont economy and Vermont legislative power was weighed. To whatever extent it is

> desirable to reform the economic standards of Vermont, 'the legislature of Vermont and not that of New York must supply the fitting remedy.' "

And, 336 U. S. at 522:

> "Added to this was the Court's appraisal of the law *as a plain discrimination against interstate commerce that would inescapably erect a barrier* to suppress competitive sales of Vermont milk in New York, thus leading to a retaliatory 'rivalries and reprisals.' " (Emphasis added.)

It must be remembered that in the case at bar Virginia has not attempted to regulate the price of milk in the District of Columbia or the manner in which it is distributed there. It has not attempted to put pressure on the District of Columbia dairies to reform economic standards; its law is not hostile to interstate commerce in conception or operation; *its purpose in fixing minimum resale prices is to conserve health and promote economic stability among Virginia producers.* The Virginia minimum price requirement fairly administered to all distributors as it has been is not the kind that breeds rivalries and reprisals.

Appellants cite the case of *Hood* v. *Du Mond*, 336 U. S. 525-576. This case is no authority for counsel's contention. In that case Hood and Sons, a Massachusetts corporation, distributed its milk products in Boston acquiring the bulk thereof outside of Massachusetts. Two receiving stations were owned in New York State near Troy. Hood wished a permit from the New York Milk Commission for another receiving station. The station would be nearer some producers already shipping to one of Hood's stations and would also attract a number of producers who would be diverted from other buyers. Permit was denied primarily on the ground that if Hood took producers delivering milk to the local markets such as Troy, it would deprive those markets of an

adequate supply especially during the short season. The Supreme Court denied the right of the Milk Commission of New York to refuse Hood an additional permit on the ground that it was a discrimination against Interstate Commerce and that the state had no right to totally prohibit the right of Hood to purchase from additional producers in New York State merely because the milk would be transported to Boston in Interstate Commerce.

This case is wholly different from the one at bar and is different also from the case of *Baldwin* v. *Seelig, supra,* 294 U. S. 511. In the *Seelig* case the exporter was not prohibited from acquiring new stations, or new producers. He merely was required to be treated and to treat others on an equal basis. In the *Hood* case, Hood was denied any access to a new market in New York because of his interstate activities.

Be it noted that the application of the minimum sale price in Virginia is equal and universal as to all milk received by wholesaler, retailer or consumer in their respective classifications in Virginia. There is no discrimination; there is no exclusion or limitation; there is no ground or basis for retaliation; the market is open to all alike.

As the majority opinion in the case of *Hood* v. *Du Mond* stated, 336 U. S. at 530:

> "It is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the *volume* of interstate commerce to aid local economic interests, that are in question here, and no such measures were attempted or such ends sought to be served in the Act before the Court in the Eisenberg Case." (Emphasis added.)

And, referring to the *Seelig* case, this Court added:

> "In that case, New York placed conditions and limitations on the local sale of milk imported from Vermont designed in practical effect to *exclude* it, while here its

> order proposes to limit the local facilities for purchase of additional milk so as to withhold milk from export. The State agreed then, as now, that the Commerce Clause prohibits it from *directly curtailing movement* of milk into or out of the State." (Emphasis added.)

Referring to various decisions in the Supreme Court on the milk industry, the opinion continued, 336 U. S. at 531:

> "It recognized, as do we, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce. But it laid repeated emphasis upon the principle *that the State may not promote its own economic advantages by curtailment or burdening of* interstate commerce." (Emphasis added.)

The test repeatedly applied by the *Hood* case is that a state may not retard, burden or constrict the flow of interstate commerce *for its economic advantage*, and may not place itself in a position of economic isolation. Finally, this Court, 336 U. S. at 539, laid down the principle that would seem to apply in all such cases and ought to be a complete answer to appellants' contention in the case at bar:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs, duties, or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."

Conclusion

The question presented is not of a substantial character. The appeal should be dismissed, or, in the alternative, the judgment below should be affirmed.

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J. Lindsay Almond, Jr.,
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